

BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A CEASE AND DESIST)
ORDER ISSUED BY THE DEPARTMENT OF)
ECOLOGY TO LOREN H. CORDER)

LOREN H. CORDER AND FRANK H.)
HILTON, JR.,)

Appellants,)

v.)

STATE OF WASHINGTON, DEPARTMENT)
OF ECOLOGY and VELMA JEAN DICKEY)
AND ALBERT H. DICKEY; RAY H.)
OGDEN AND HARRYETTE J. OGDEN,)

Respondents.)

SHB No. 78-47

FINAL

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

This matter, the appeal of a Department of Ecology Regulatory
Order issued under WAC 173-14-180, came on for hearing before the Shoreline
Hearings Board, Dave J. Mooney, Chairman, Chris Smith, David Akana, Robert
E. Beaty, William A. Johnson and Rodney Kerslake, Members, convened at
Long Beach, Washington on March 22, 1979. Hearing examiner William A.
Harrison presided.

1 Appellants Loren H. Corder and Frank H. Hilton, Jr. appeared
2 and represented themselves. Respondent Department of Ecology appeared
3 by its attorneys Richard Kirkby and Robert V. Jensen, Assistant Attorneys
4 General. Respondents Velma Jean Dickey and Albert H. Dickey; Ray H.
5 Ogden and Harryette J. Ogden also appeared. Vancouver reporter Ross
6 H. Ortega recorded the proceedings.

7 Witnesses were sworn and testified. Exhibits were examined.
8 From testimony heard and exhibits examined, the Shorelines Hearings Board
9 makes these Findings of Fact, Conclusions of Law and Order:

10 FINDINGS OF FACT

11 I

12 Appellant, Loren H. Corder, sold adjoining residential lots to
13 respondents, Mr. and Mrs. Ogden and Mr. and Mrs. Dickey, in 1975. The
14 two lots are located north of Long Beach, Washington on the shore of
15 the Pacific Ocean. Some five years prior to the sale, and prior to
16 enactment of the Shoreline Management Act of 1971, chapter 90.58 RCW,
17 a passageway was graded along the common lot line which lies perpendicular
18 to the waterline. This passageway breached the sand dunes running
19 parallel to the waterline. By this action, automobile access was created
20 through the passageway, to the broad beach lying between the dunes and
21 the waterline.

22 By judgment of the Superior Court for Pacific County (Cause No.
23 18743 entered June 8, 1977), appellant, Corder, is entitled to the
24 use and benefit of a fifty-foot easement centering on the common
25 property line, and therefore coinciding with the passageway previously
26 described.

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Appellant, Corder, regularly drives his automobile along the passageway in question when visiting or returning from the beach. By Mr. Corder's permission, appellant, Hilton, drives his gasoline powered, riding lawn mower, and small trailer, along the passageway when going to or returning from Mr. Corder's grass airstrip which is located upland and which Mr. Hilton mows. Other motor vehicles have been observed traversing this passageway.

III

Although this driving causes some effect upon vegetation it causes no effect upon the sand surface excepting de minimis compaction or shifting of sand caused by the wheels of the vehicles.

IV

On complaint of respondents, Dickeys and Ogdens, respondent, Department of Ecology issued a regulatory order under WAC 173-14-180 that appellant, Corder, shall cease and desist from utilizing, or authorizing others to utilize, the passageway for vehicular access.

From this order, appellants appeal, under WAC 173-14-190.

V

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings, the Shorelines Hearings Board comes to these

CONCLUSIONS OF LAW

I

The Shorelines Hearings Board concludes that it lacks jurisdiction to hear such appeals because WAC 173-14-190 conferring such jurisdiction

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1 upon us is beyond the framework and policy of the Shoreline Management Act
2 of 1971 (SMA), chapter 90.58 RCW, and thus void.

3 The SMA is comprehensive in scope. It expressly grants
4 authority to the Shorelines Hearings Board (Board) to review
5 appeals regarding the granting, denying or rescinding of permits
6 under the Act (RCW 90.58.180(1) and (2)) and appeals by local government
7 of master programs (RCW 90.58.180(4)). Although the Act grants
8 no further express authority to the Board, there are several express
9 provisions which round out a full scheme for adjudication and
10 enforcement of the Act without involvement of the Board.

11 The first of these provides for criminal fines (RCW 90.58.220)
12 and the second provides for damages (RCW 90.58.230). The Department
13 of Ecology has conceded that these are matters which are beyond the
14 purview of the Board and properly belong to the courts. The third
15 such provision (RCW 90.58.210) states:

16 "Court actions to insure against conflicting
17 uses and to enforce. The attorney general or the
18 attorney for the local government shall bring such
19 injunctive, declaratory or other actions as are
20 necessary to insure that no uses are made of the
21 shorelines of the state in conflict with the
22 provisions and programs of this chapter and to
23 otherwise enforce the provisions of this chapter.
24 (Emphasis added.)

25 This provision on injunctive or declaratory relief, like the others
26 or criminal fines and damages, identifies the courts as the
27 appropriate forum and not the Board. There is no implication that
28 a proceeding before the Board is a necessary prerequisite to
29 injunctive or declaratory relief.

30 Against this statutory background Department of Ecology has

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adopted the following rules:

WAC 173-14-180 REGULATORY ORDERS BY LOCAL GOVERNMENT OR THE DEPARTMENT. (1) Local government and the department shall have the authority to serve upon a person undertaking, or about to undertake development as defined in RCW 90.58.030(3)(d), a regulatory order if:

(a) The development constitutes an integral part of a project being undertaken, or about to be undertaken, on the shorelines of the state in the absence of a substantial development, conditional use, or variance permit; or

(b) The development being undertaken, although an integral part of a project approved by an existing, valid substantial development, conditional use, or variance permit is outside the scope and intent of said permit; or

(c) The development being undertaken on the shorelines of the state is in violation of chapter 90.58 RCW, and/or one of the following:

(i) Prior to the formal adoption or approval by the department of a master program for the area, the guidelines and regulations of the department, and so far as can be ascertained, the master program being developed for the area.

(ii) Thereafter this regulation of the department and the adopted or approved master program for the area.

(2) The regulatory order shall set forth or contain:

(a) The specific nature, extent and time of violation, and the damage or potential damage;

(b) An order that the violation or the potential violation cease and desist or, in appropriate cases, the specific corrective action to be taken within a specific and reasonable time; and

(c) The right of the person to whom the order is directed to a hearing before the shorelines hearings board.

(3) A regulatory order issued pursuant hereto shall become effective immediately upon receipt by the person to whom the order is directed and shall become final unless review is requested pursuant to WAC 173-14-190.

WAC 173-14-190 HEARINGS ON REGULATORY ORDERS. (1) The person to whom the regulatory order is directed may request review to the shorelines hearings board within thirty days after being served. The requirements of RCW 90.58.080(1) and chapter 461-08 WAC shall apply to all said requests for review: PROVIDED, HOWEVER, That there shall be no requirement for such requests to be filed with and certified by the department and the

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1 attorney general.

2 (2) All hearings held pursuant to this provision
3 and judicial review thereof shall be in accordance with
the rules establishing the shorelines hearings board
contained in chapter 90.58 RCW and to chapter 461-08 WAC.

4 The effect of these rules is to place before this Board, with request
5 for affirmation, orders which at once declare a violation of the
6 shoreline law and mandate or prohibit action by the party receiving
7 it. The SMA does not give this Board specific authority to hear and decid
8 appeals of such orders.

9 The State Suprere Court applied the following test in reviewing
10 the authority of a state agency:

11 It is well settled in this state, as elsewhere,
12 that a public service commission, such as the
department of public service in this state, is
13 an administrative agency created by statute and
as such has no inherent powers, but only such as
14 have been expressly granted to it by the legis-
lature or have, by implication, been conferred
15 upon it as necessarily incident to the exercise
of those powers expressly granted.

16 State ex rel. P.U.D. v. Dept. of Public Service, 21 Wash.2d 201, 208,
17 209, 150 P.2d 709 (1944). Accord, Ortblad v. State, 85 Wash.2d 109, 530
18 P.2d 635 (1975), Burlington Northern, Inc. v. Johnston, 89 Wash.2d 321,
19 572 P.2d 1085 (1977). While the injunctive jurisdiction conferred upon
20 this Board by WAC 173-14-190 is not abstractly inappropriate, such
21 jurisdiction is not necessarily incident to the exercise of the express
22 statutory jurisdiction of the Board, nor a necessary antecedent to injunct
23 relief by court action as called for in the Act (RCW 90.58.210, supra).
24 Such jurisdiction therefore fails the test of state agency authority
25 set out above.

26 An agency may not legislate under the guise of the rule making

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1 power and may not alter or amend an act. Rules must be written
2 within the framework and policy of the applicable statutes.
3 Burlington Northern, Inc. v. Johnson, 89 Wash.2d 321, 572 P.2d
4 1085 (1977), Public Disclosure Com'n v. Rains, 87 Wash.2d 626,
5 555 P.2d 1368 (1976), Allen v. Employment Security Dep't., 83
6 Wash.2d 145, 516 P.2d 1032 (1973). Kitsap-Mason Dairymen v. Tax
7 Comm'n., 77 Wash.2d 812 (1970), Pringle v. State, 77 Wash.2d 569 (1970).
8 Pierce County v. State, 66 Wash.2d 728 (1965) and State ex rel
9 West v. Seattle, 50 Wash.2d 94 (1957). The language of the Act
10 directing injunctive or declaratory action to a court evinces
11 a legislative policy choice which places this relief with the
12 courts and not with this Board. We hold, therefore, that WAC 173-14-190,
13 conferring jurisdiction upon this Board as previously described,
14 alters and amends the Act, is beyond the framework and policy of the
15 Act when read as a whole, and is therefore void.

16 II

17 Any Finding of Fact which should be deemed a Conclusion of Law
18 is hereby adopted as such.

19 From these Conclusions the Board enters this

20 ORDER

21 This matter is dismissed for lack of jurisdiction.
22
23
24
25

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1 DATED this 11th day of June, 1979.

2 SHORELINES HEARINGS BOARD

3 Dave J. Mooney
4 DAVE J. MOONEY, Chairman

5 Chris Smith
6 CHRIS SMITH, Member

7 David Akana
8 DAVID AKANA, Member

9 Robert E. Beaty
10 ROBERT E. BEATY, Member

11 William A. Johnson
12 WILLIAM A. JOHNSON, Member

13 Rodney Kerslake
14 RODNEY KERSLAKE, Member
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